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July 24, 2014

Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: SR-FINRA-2014-028
Proposed Rule Change Relating to Revisions to the
Definitions of Non-Public Arbitrator and Public Arbitrator

Dear Ms. Murphy:

On behalf of the Public Investors Arbitration Bar Association ("PIABA")¹, I thank the Securities and Exchange Commission ("Commission") for the opportunity to comment on the proposed amendments to FINRA Rules 12100 and 13100, amendments which would significantly revise who may be classified as a "public" arbitrator and "non-public" arbitrator under the Code of Arbitration Procedure for Customer Disputes and the corresponding Code sections for industry disputes.

One of the objectives of the proposal is to re-organize the definition of "public arbitrator" by removing cross-references amongst definitions and providing more detailed descriptions of disqualifying factors, in order to "to make it easier for FINRA staff, arbitrators and potential arbitrators, and parties to ascertain the correct arbitrator classification." PIABA supports this objective because it not only enhances efficiency, but would also advance compliance with the rules governing arbitrator classifications. To that end, it would help prevent parties from being forced to select among less than the appropriate number of "public" or "non-public" arbitrators on ranking lists, and from selecting arbitrators who were improperly included in the public or non-public lists.

Notwithstanding, PIABA believes that the definition of "non-public arbitrator" needs to be revised further to include other industry professionals who, under the current proposal, could improperly qualify as "public" arbitrators, despite their ties to the industry. It is vital that the "non-public" definition be comprehensive to ensure that it is gap-proof and so that it achieves its purpose,

¹ PIABA is a national, not-for-profit bar association comprised of attorneys, including law professors and regulators, both former and current. PIABA's mission is to promote the interests and protect the rights of the public investor.

i.e., investors' confidence in the integrity of the forum. Furthermore, as explained below, PIABA objects to the proposed removal of attorneys, accountants and other professionals from "public arbitrator" classification.

I. FINRA's arbitrator classification combats perceived industry bias.

Investor confidence in the neutrality and fairness of the FINRA arbitration forum has always been the key motivation behind separating potential arbitrators into the "public" and "non-public" profiles.

Because on the predominant use of arbitration clauses in customer agreements, FINRA's Dispute Resolution services are in most cases the only forum for the investing public to bring claims against registered representatives and broker-dealers. The perception of industry bias – and the efforts necessary to dispel that perception – is even stronger of FINRA's arbitration services than of our judicial system. This is, in part, because FINRA and its predecessor organizations, as self-regulating entities, have always been inherently comprised of, and supported by, the securities industry. PIABA applauds all efforts by FINRA to enforce its own goals of a neutral dispute resolution service and to combat both perceived and real bias within that service.

The fact-finder and ultimate decision maker in any FINRA arbitration is the appointed three- person arbitration panel (or sole arbitrator depending on the amount of damages claimed). While recognizing that arbitrators with former or current industry affiliations may bring valuable insight to a panel, FINRA has tried to balance potential industry bias with the creation of the "public" versus "non-public" arbitrator classification.

II. The definitions should be expanded to prevent individuals with substantial ties to the securities and/or investment industry from serving as public arbitrators.

Over the years, FINRA's definitions of arbitrators has been amended a number of times. *See* SR-FINRA-2014-028, p. 5, FN 2. Among other things, the most recent amendments, in 2013, designated those associated with mutual funds or hedge funds as "non-public" arbitrators and precluded them from ever serving as public arbitrators.

In its February 7, 2013 comment letter to the Commission addressing the then-proposed rule change set forth in SR-FIRNA-2013-003 ("PIABA's February 2013 Letter"), PIABA supported FINRA's preclusion of mutual fund / hedge fund-associated individuals from the "public arbitrator" definition yet advocated for the further expansion of disqualifying criteria to preclude others who were associated

with the securities industry. For example, PIABA argued that the definition should be broad enough to exclude persons associated with non-traded REITs and other private placements, as well as investment products that have embedded securities. *See* PIABA's February 2013 Letter, p. 2.

PIABA continues to strongly believe that the definitions need to be further broadened to eliminate from the "public" pool all those with ties to the industry. Such changes are necessary, first and foremost, to promote investor confidence in the integrity of the FINRA forum. Moreover, the suggested revisions would serve to simplify and streamline, for FINRA staff, arbitrators and parties, the process of determining the appropriate classification for a given arbitrator.

As explained in PIABA's February 2013 Letter:

FINRA Conduct Rules, including, but not limited to, FINRA's suitability and know your customer rule (Rule 2111 and Rule 2090), apply to many products... Some of these other investment products have become more frequent subjects of investors' arbitration claims. Professionals who are affiliated with the sponsors or issuers of such products or any securities products, for that matter, should not be allowed to serve as public arbitrators

...The definition of "public arbitrator" should be amended to exclude individuals who are affiliated with entities which act as sponsors, issuers, marketers, or sellers of securities or other investment products with embedded securities.

See PIABA's February 2013 Letter, p. 2. Due to the ever-changing landscape of products and services offered to the investing public, PIABA believes that rather than limit itself to specific types of investments, the description of individuals who would be precluded from the "public" classification should be generalized. A generalized definition would not only avoid misclassifications of arbitrators, but would better protect the investing public and promote confidence in the forum, regardless of the products at issue.²

² This comment letter dovetails with PIABA's February 2013 Letter in that, while espousing the same perspective for revising the arbitrator definitions, it expands on PIABA's previous suggested revisions.

Under the current proposal, there are additional categories of individuals with substantial ties to the securities industry who would still escape the proposed “non-public” definition and be allowed to be classified as “public,” despite having close ties to the financial services industry.

Accordingly, PIABA respectfully proposes that the definition of “non-public arbitrator” under proposed Rule 12100(p) be revised to read:³

1. any persons who engaged in, or who were employed by, or who were affiliated with, any business that directly, or indirectly through affiliates, offered or sold securities, public or private, including but not limited to stocks, bonds, mutual funds, hedge funds, limited partnerships, tenant in common investments, real estate debt or equity investments, debt or equity instruments of any nature, or any other type of investment that was offered, sold or syndicated to individual or institutional investors.
2. Persons who served as attorneys, accountants or otherwise provided other professional consulting services of any nature to any of the persons described in Paragraph 1 above.

The “public” arbitrator pool should be limited to those who have or had no affiliation with any business that engaged in the purchase, sale or brokerage of any investments of any type.

PIABA supports the proposed adoption of new Rule 12100(p)(1) to eliminate the cooling-off period for arbitrators “who are, or were, affiliated with a specified financial industry entity at any point in their careers, for any duration, as non-public.” SR-FINRA-2014-028, p. 9. However, PIABA proposes that new Rule 12100(p)(1) cover the additional industry affiliations described in Paragraph 1 of PIABA’s proposed “non-public” definitions, above.

Finally, PIABA supports proposed new Rule 12100(p)(2) and (4), as applied to attorneys, accountants, and other professionals who serve or served the industry within the past five years.

³ PIABA’s comments to the proposed Rule 12100 definitions also apply to the corresponding Rule 13100 sections.

III. Attorneys, accountants and other professionals who service the investing public should not be designated as “non-public”.

While PIABA supports much of the proposed rule changes, it takes issue with proposed new Rule 12100(p)(3) and corresponding proposed 12100(u)(3), (7) and (10), under which attorneys and other professionals who service investors in securities disputes would be prevented from serving as “public” arbitrators.⁴ Such change would mark a radical departure from the historical logic of designating arbitrators as “non-public” vs. “public.”

The categorizing of a proposed arbitrator as “public” or “non-public” has always focused on the nature and extent of the individual’s ties to the financial industry. The need to create the public and non-public pools was borne solely out of perceived bias on the part of the industry, and in the interest of protecting the investing public.

From inception, the bifurcation of arbitrators into the public and non-public pools was designed to allay the investing public’s perception of bias on the part of arbitrators with close industry affiliations. From the earliest formulation of the rule, codified in NASD Rule 10308, the non-public designation was limited only to those with industry affiliations. In fact, in all the rule’s subsequent revisions, only industry-tied arbitrators were included in the definition of “non-public.” Individuals with associations with the investing public have always and only been included in the public arbitrator pool.

That the motivation behind the “non-public” and “public” arbitrator classification system was designed to protect the investor is self-evident from the February 2, 2004 letter filed with the Commission by the NASD in response to comments made to SR-NASD-2003-95. In its letter, the NASD states that the proposals to amend the classification basis for “public” arbitrators was to “ensure that parties who have, or who are reasonably perceived to have, significant ties **to the securities industry** cannot serve as public arbitrators, even if those ties are indirect” and that the public arbitrator designation is “to protect both the integrity of the NASD forum, and investors’ confidence in the integrity of the forum.” *Id.* (Emphasis added).

In substantiating this aspect of the current proposed rule change, FINRA states that it wishes to address the concerns of “[i]ndustry representative [who] raised concerns about the neutrality of the public arbitrator roster.” SR-FINRA-2014-028,

⁴ Likewise, PIABA objects to the adoption of new Rule 12100(u)(3), which details how and when such a professional could join the public arbitrators’ ranks. In PIABA’s view, such professionals should not be precluded from serving as public arbitrators, provided they are not otherwise disqualified under the Rules.

p. 8. However, FINRA cites no evidence to support the conclusion that attorneys, accountants and other professionals who serve the investing public are biased for or against the securities industry. FINRA only cites to one comment letter written by David T. Bellaire, Executive Vice President and General Counsel of the Financial Services Institute (“FSI”), a lobbying organization whose members are financial advisors and independent broker-dealers such as Berthel Fisher & Company, LPL Financial, and Raymond James Financial Services.

One letter written by a pro-securities industry group that contains unsupported and incorrect information to support its conclusions is hardly a reason to arbitrarily single out and exclude certain arbitrators from the public pool simply because they happened to serve the public. Under Mr. Bellaire’s rationale, arbitrators from many other professions should also be arbitrarily excluded from the public pool based on a hunch that they must be biased against the securities industry (e.g. estate planning attorneys or volunteers who help educate seniors about the risks topics such as financial exploitation).

In short, placing arbitrators with no ties to the securities industry into the non-public pool makes no logical sense and would harm the integrity of the arbitration process because parties would not have accurate disclosure information to rely on in selecting arbitration panels. For example, in many cases parties prefer to include non-public arbitrators on arbitration panels because of their experience in the securities industry. Under FINRA’s proposed rule change, arbitrators with no ties to or experience in the securities industry would be included in the non-public pool and parties could mistakenly select an arbitrator from the non-public pool based on the mistaken belief that they have ties to the securities industry. Indeed, according to FINRA, arbitrator neutrality is the cornerstone of arbitration, and full and accurate disclosure of an arbitrator’s background and potential conflicts is the only way to ensure arbitrator neutrality. This portion of FINRA’s proposed rule would undermine its own stated goal.

FINRA’s stated mission is one of investor protection. As outlined above, PIABA supports much of the proposed Rule changes, which would serve to advance that objective. Nonetheless, in order to adequately protect the investing public and to improve investor confidence in the fairness of the arbitrator roster, PIABA believes that the “non-public” arbitrator definition needs to be expanded to include all individuals with substantial industry affiliations. Finally, the proposed Rule change excluding investors’ attorneys and other representatives from serving as “public” arbitrators should be rejected.

Elizabeth M. Murphy, Secretary
July 24, 2014
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I would like to again thank the Commission for the opportunity and privilege to comment on SR-FINRA-2014-028.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Jason Doss", with a long horizontal flourish extending to the right.

Jason Doss
PIABA President